



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC APPLICATION NO. 322 OF 2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

REPUBLICAPPLICANT

VERSUS

THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.....RESPONDENT

Exparte: Mwangi Mathenge

JUDGEMENT

1. By a Notice of Motion dated 25th September, 2013 the *ex parte* applicants herein, **Mwangi Mathenge**, seeks the following orders:
 1. **THAT this Honourable Court do issue an order of Mandamus against the Respondent to the effect that the pays the ex parte applicant the sum of Kshs.2,594,209/= within 14 days of service of this order and in default he be committed to civil jail for a period not exceeding 6 months.**
 2. **THAT costs of this application be provided.**
2. The application was supported by a verifying affidavit sworn by the Applicant herein on 25th September, 2013.
3. According to the applicant, on or about on 28th December, 1986 he was arrested by 5 Special Branch Police Officers who took him to Menengai Police Station and locked him up until 30th December, 1986 when he was blindfolded, ordered to lie down and put in a green land rover and driven to Nairobi and locked at Nyayo House Basement Torture chambers in a dark cell.
4. According to him, his fundamental rights and freedoms were contravened and grossly violated by Special Branch Police Officers and other Kenyan Government servants, agents, employees and institutions on 30th December 1986 and for 36 days at Nyayo House Torture Chambers and thereafter in Kenya prisons. He filed the petition at the High Court Petition No.240 of 2009 for compensation against the said Attorney General for damages and compensation for the violations and contraventions of my fundamental rights and freedoms under the provisions of the Constitution.
5. Pursuant hereto **Justice Mumbi Ngugi** awarded him the sum of Shillings Kshs.2,000,000/= and the amount now outstanding is Kshs.2,594,209/= inclusive of interest of Kshs.344,548/= from 20th August, 2012 to 29th July, 2013 and costs of Kshs.249,661/=, but the same has not been paid to him despite having served the Attorney General with a certified decree, certificate of costs and

- Certificate of Order against the Government.
6. The application was not opposed by the Respondents.
 7. I have considered the application, the verifying affidavit as well as the submissions file on behalf of the applicants.
 8. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Kosoro**, I expressed myself as hereunder:

“...in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.....The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

9. I adopt my reasoning in the said case.
10. In the absence of any replying affidavit, this court finds merit in the Notice of Motion dated 25th September, 2013 save for the fact that the prayer seeking an order that in default he be committed to civil jail for a period not exceeding 6 months. That prayer is premature at this stage since an order of committal can only be made where the conditions precedent for grant of an order for committal have been complied with.

11. Accordingly, an order of mandamus is hereby issued directed at the Respondents compelling them to pay the ex parte Applicant the sum of Kshs.2,594,209/=. The applicant will have the costs of this application.

Dated at Nairobi this day 8th of April 2014

G V ODUNGA

JUDGE

Delivered in the absence of the parties duly notified.